No. 98-____ (1)

Supreme Court, U.S.
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Supreme Court of the United States

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OCTOBER TERM, 1998

PLANNED PARENTHOOD OF THE BLUE RIDGE; HERBERT C. JONES, JR., M.D.; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON; VIRGINIA LEAGUE FOR PLANNED PARENTHOOD; HILLCREST CLINIC; RICHMOND MEDICAL CENTER FOR WOMEN; THOMAS H. GRESINGER, M.D.; COMMONWEALTH WOMEN'S CLINIC; and PLANNED PARENTHOOD OF SOUTHEASTERN VIRGINIA,

Petitioners,

—v.—

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all the Commonwealth's Attorneys in Virginia,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, contrary to Justice Powell's opinion in *Bellotti v. Baird*, 443 U.S. 662 (1979), that a state may require parental notification of an abortion for a mature minor in every case except where the minor alleges prior abuse or neglect?

2. Whether the court of appeals erred in treating the burdens imposed by forced parental notice of abortion for non-abused mature minors, the state purposes underlying such forced notice, and the extent to which such notice serves legitimate state interests, as matters of law rather than as questions of fact, contrary to this Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)?

3. Whether the court of appeals erred in holding, contrary to this Court's opinion in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), that there exists a parental right to know about a mature minor's abortion decision?

PARTIES TO THE PROCEEDING

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Petitioners Planned Parenthood of the Blue Ridge, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit entered on August 20, 1998.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia granting a preliminary injunction was filed on June 30, 1997. A-89-104.[1] The opinion of the United States Court of Appeals for the Fourth Circuit was issued on August 20, 1998. A-2-88. The opinion of the court of appeals is reported at 155 F.3d 352 (4th Cir. 1998). The opinion of a single judge of the court of appeals staying the preliminary injunction is reported at 116 F.3d 707 (4th Cir. 1997) (Luttig, J.), and the Order of the court of appeals denying a motion to vacate the single-judge stay is reported at 125 F.3d 884 (4th Cir. 1997). The opinion of the district court is unreported.

JURISDICTION

The opinion as to which review is sought was issued on August 20, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, which provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Va. Code Ann. § 16.1-241(V). A-105-108.

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[1] The opinions and statutory provisions involved are reprinted in the Appendix to this Petition. Citations to the Appendix are made in the form "A-__."

STATEMENT OF THE CASE

The Virginia Parental Notice Act, Va. Code Ann. § 16.1-241(V) ["the Act"], was signed into law by the Governor of Virginia on March 22, 1997, and took effect on July 1, 1997. The Act prohibits physicians from performing abortions for an unemancipated minor unless a parent, legal guardian, or person standing *in loco parentis* [collectively, "authorized persons"] has been given at least twenty-four hours notice of the abortion.[2] The Act defines an emancipated minor as one: who has been married; who is on active duty with the armed forces of the United States; or who, with the consent of her parents, is willingly living apart from them. A-107.[3] The Act is an anomaly in Virginia, which generally allows minors to consent as adults to a wide range of mental health care, family planning and substance abuse treatment. *See* Va. Code Ann. § 54.1-2969(D).

The Act purports to contain two exceptions to the notice requirement. First, notice is not required if the minor declares to the physician that she has been the victim of abuse or neglect, and the physician "has reason to suspect that the minor may be an abused or neglected child as defined in [Va. Code Ann.] § 63.1-248.2 and reports the suspected abuse or neglect in accordance with § 63.1-

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[2] "Abortion" is defined to include "interrupt[ion] or terminat[ion] [of] a pregnancy by any surgical or nonsurgical procedure or to induce a miscarriage as provided in § 18.2-72, 18.2-73 or 18.2-74." A-107.

[3] The Act also states that a minor is emancipated if she has obtained an order of emancipation under Va. Code § 16.1-331, but this statute mimics the three specific bases for emancipation set forth in the Act itself. The Act therefore does not exempt minors who have obtained "common law" emancipation, to the extent such a status remains available in Virginia. *See Brumfield v. Brumfield*, 74 S.E.2d 170, 173-74 (Va. 1953) (discussing "complete" and "partial" emancipation).

248.3."[4] A-106. Second, notice is not required if "the abortion is medically necessary immediately to avert the minor's death," or if "there is insufficient time to provide the required notice or judicial authorization because a delay would create a serious risk of substantial impairment of a major bodily function or substantial physical injury." A-106.

"Notice" may be accomplished in four ways. Notice is achieved if: (1) "the physician or his agent has given actual notice of his intention to perform [the] abortion to an authorized person, either in person or by telephone, at least twenty-four hours previous to the performance of the abortion"; (2) certified, return-receipt-requested mail is delivered to an authorized person 72 hours before the abortion (but such notice is only permitted "after reasonable effort to notify an authorized person"); (3) one authorized person is present with the minor seeking the abortion; or (4) the minor delivers to the physician a written statement signed by an authorized person stating that the authorized person knows of the minor's "intent" to have an abortion. A-107.

The Act permits a minor to seek a judicial waiver of parental notice, in the first instance, from the Virginia Juvenile and Domestic Relations Court ["JDR court"]; if her request is denied, she may appeal to the circuit court. The JDR court first determines whether "the minor is mature and capable of giving informed consent to the proposed abortion." A-105. If the JDR court finds the minor to be "mature and capable of giving informed consent," the court "may" grant judicial authorization to proceed with the

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[4] If a report is made, the abusive parent will receive, at a minimum, a report from the social service agency stating whether the report was founded or unfounded. *See* A-51 n.8. However, in a case where the minor is in "imminent danger" -- such as incest -- the social services agency may attempt, without court order, to take immediate custody of the minor. Va. Code Ann. § 63.1-248.9(A)(1). Of course, such an attempt may result in *de facto* immediate notice to the parents.

abortion without parental notice. A-105.[5] Thus, according to the plain language of the statute, the JDR court is given unfettered discretion to *deny* authorization for the abortion if the minor is found to be mature. Forms promulgated by the Office of the Executive Secretary of the Virginia Supreme Court ["the Executive Secretary"] confirm this grant of discretion by explicitly providing the JDR court with a check-off box to "deny" a judicial waiver of parental notice upon a finding that the minor is mature. A-109.[6]

The Act contains a general statement providing that judicial bypass proceedings "shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor." A-105. However, the Act contains no guarantee that court *records* of proceedings shall be confidential.

The Act also sets no time limit within which the JDR court must *decide* the minor's petition. It only provides that the proceedings "shall be *heard* as soon as practicable but in no event later than four days after the petition is filed." A-105 (emphasis added). Nor is the minor protected by the Act's provision directing automatic authorization for an abortion if the JDR court "fails to act within the time periods" prescribed, because there is no time period set for decision by the JDR court. Thus, the Act gives to JDR

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[5] In contrast, if the JDR court finds the minor is "not mature," the judge "shall, after a hearing, determine whether the performance of an abortion upon the minor without notice to an authorized person would be in the minor's best interest," and, if the court finds "that the abortion would be in the minor's best interest, it *shall* so authorize a physician [to perform the abortion]." A-105 (emphasis added). In other words, in such cases, the JDR court has no discretion to deny authorization for the abortion.

[6] Likewise, guidance issued by the Executive Secretary to the JDR courts calls attention to the constitutional problems raised by the Act's grant of discretion to the JDR court to deny judicial authorization for an abortion to a minor found to be mature. A-112-13.

judges authority to withhold *decision* on the minor's petition for an indefinite time period. The Executive Secretary's guidance to the JDR court confirms this discretion. A-113 ("Section 16.1-241(V) explicitly requires the circuit court to *hear and decide* the matter not later than five days after filing, but it directs the juvenile and domestic relations court only to *hear* the proceeding not later than four days after filing. Therefore, while the circuit court cannot avoid issuing either a decision within the specified time frame or a 'default authorization,' it appears that the statutory language would permit the juvenile and domestic relations district court to take the matter under advisement. . . . Taking these petitions under advisement presents a serious 'slippery slope' problem. Once the statutory four day time frame is breached, there is no corresponding statutory brake to apply when one begins to move down that 'slippery slope.'").

By contrast, if the minor does not obtain a judicial waiver of parental notice and appeals to the circuit court, the appeal "shall be *heard and decided* no later than five days after the appeal is filed." *Id.* (emphasis added). Nevertheless, because the minor may appeal to the circuit court only if the JDR court "denies an order authorizing an abortion without notice," A-105, if the JDR court withholds a decision, the minor has *no* recourse but to wait and forego her right to obtain an abortion completely -- or to notify a parent against her will and better judgment, potentially exposing herself to risk of serious harm.

The Act provides for no further appeals beyond the circuit court. Thus, if the minor loses her appeal in the circuit court, a further appeal to the Virginia Court of Appeals or Virginia Supreme Court, if any is allowed, will occur without any time limitations or guarantees of confidentiality. Moreover, since the "appeal" to the circuit court from the JDR court is *de novo*, the Act establishes no mechanism for genuine appellate review.

On June 12, 1997, petitioners, a group of physicians and clinics that provide abortions for women under the age of 18 and make abortion referrals for these women, filed this case in the United States District Court for the Western District of Virginia, and at the same time sought a temporary restraining order and a preliminary injunction against enforcement of the Act. The district court held a non-evidentiary hearing on plaintiffs' motion for temporary injunctive relief on June 26, 1997. On June 30, 1997, the district court issued a preliminary injunction against enforcement of the Act. The district court, consistently with every other court to address the issue, held that a parental notice statute must contain a judicial bypass mechanism satisfying the criteria established by this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"), for parental consent statutes. A-97-98. The district court held that the Act's judicial bypass mechanism is inadequate because it allows a court to deny a mature minor an abortion even if the minor is found to be mature. A-101.

On the same day that the district court issued the preliminary injunction, Respondent ["the state"] sought a stay of the injunction from Circuit Judge Luttig, proceeding under a rule of the Fourth Circuit permitting emergency motions to be made directly to a single judge of that court in chambers. Judge Luttig granted the state's motion within hours and issued an opinion supporting the stay on July 3, 1997. *See* 116 F.3d 707 (4th Cir. 1997) (Luttig, J.). The court of appeals *en banc* denied Petitioners' motion to vacate the stay on October 20, 1997, by a 7-5 vote. *See* 125 F.3d 884 (4th Cir. 1997) (en banc).

On August 20, 1998, the court of appeals *en banc* vacated the preliminary injunction and, ruling upon the merits, remanded the case to the district court with direction to enter judgment for the state. A-69. The court of appeals first held that it would decide the case "on the merits," even though the appeal was from a preliminary injunction, and plaintiffs have

not had an opportunity to present evidence on critical facts. A-16.[7]

The court of appeals then proceeded to the merits, without remanding to allow presentation of evidence on the issues upon which it rested its legal conclusions: that a parental notice statute is *per se* less burdensome than a consent statute. *See* A-39-42. Based on this assumption, the court held that a parental notice statute is constitutional even if it does not contain an alternative mechanism under which a minor, if she proves herself to be mature and capable of giving informed consent, is entitled to a waiver of parental notice. Specifically, the court held that a parental notice is constitutional so long as it "does not condition the minor's access to abortion upon notice to abusive or neglectful parents, absent parents who have not assumed their parental responsibilities, or parents with similar relationships with their daughters . . . ." A-32. The court held that this was true for either a "one-parent or two-parent" notice statute, and that states were free to establish judicial bypass procedures that allow state judges "discretion to require mere notice to the *parents* of even a *mature* minor." A-64 (emphasis added). The court further held as a matter of law that a parental notice requirement does not have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion," A-32 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992)).

The holding that a parental notice statute need not incorporate a mechanism under which a mature minor is entitled to avoid parental notice was joined by six of the ten circuit judges participating in the decision. The remaining four circuit judges would have held that a parental notice

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[7] The court of appeals, however, incorrectly suggested that the plaintiffs had "agreed" at oral argument that no further factual development in the case was necessary. A-16. The transcript of the oral argument discloses no such concession.

statute must contain a mandatory judicial bypass for mature minors. A-87. These judges, however, would have held that the Act contains such a bypass by construing the word "may" to be mandatory in meaning. A-87.[8] In contrast, the majority opinion does not so construe the Act; instead it "assumes" that Virginia courts *would* construe the Act "to provide a mandatory notice bypass for an *abused* mature minor." A-55 (emphasis added). In other words, the majority opinion appears to assume that the Virginia courts would construe the Act to allow denial of a bypass for a *non*-abused mature minor. The majority below holds that only those mature minors who have suffered abuse or neglect are entitled, as a matter of constitutional law, to make the abortion decision without parental consultation. Moreover, the court held that even in such a case, giving effective notice to parents after the abortion is permissible. *See* A-52 n.8.

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[8] A construction of the Act to render the word "may" mandatory is untenable given the promulgation by the Executive Secretary of forms and written guidance to state judges confirming the discretionary meaning of the term. A-109; A-112. Such a construction should not be rejected by the federal courts unless it is "clearly incorrect." *Macias v. New Mexico Dep't of Labor*, 21 F.3d 366, 369-70 (10th Cir. 1994). Given the state agency construction, a contrary construction by a federal court is not one to which the Act is "readily susceptible," *see Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988); instead, such a construction, while theoretically possible, *see Harper v. Virginia Dep't of Taxation*, 462 S.E.2d 892, 898 (Va. 1995) ("the word 'may' is prima facie permissive, importing discretion, but the courts construe it to be mandatory when it is necessary to accomplish the manifest purpose of the Legislature"), is proper only if the Virginia Supreme Court, upon certification, overturns the interpretation rendered by its own Executive Secretary. The court below could have availed itself of certification. *See, e.g., Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1074 (1997) ("the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court"); *Bellotti v. Baird*, 428 U.S. 132 (1976) ("*Bellotti I*") (directing certification of questions about the construction of state abortion statute).

The court below also rejected plaintiffs' remaining challenges to the Act, rather than remand to the district court, even though the district court did not reach these claims in its preliminary injunction decision. First, the court evaluated the Act's "medical emergency" exception, which it characterized as "ensur[ing] that the statute's requirements will not endanger the minor's health or life." A-49 n.7.[9] The court held that this exception was constitutional even if it did not "allow abortions without notice when delay would risk the minor's emotional health," *id.*, stating that it "doubt[ed] that the [Supreme] Court would require an emotional health exception even to an abortion regulation that banned certain abortions entirely," and that, in any event, no emotional health exception is required to a statute "that merely delays the contemplated abortion for a short period of time." A-49 n.7.

Next, the court rejected Petitioners' challenge to the adequacy of the Act's protection for the confidentiality of judicial bypass court records, relying principally upon the Executive Secretary's instructions to the JDR and circuit courts to keep the records strictly confidential. The court read these instructions to be cloaked with the imprimatur of the Chief Justice of the Virginia Supreme Court. A-58-59.[10]

Finally, the court rejected Petitioners' challenge to the Act's failure to prescribe any definite time in which the JDR court must decide the minor's request for judicial waiver of parental notice. The court held that the judicial bypass is

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[9] The court wrote that this exception was challenged "for the first time on appeal," A-49 n.7, and suggested that this challenge may have been "waived." *Id.* There could not have been waiver of this argument, which is encompassed within Plaintiffs' Complaint, prior to a final judgment by the district court.

[10] Petitioners do not seek review of the court of appeals' holding that the confidentiality protections of the Act are sufficient, since these protections have been promulgated by the responsible state agency. *See supra* n.8.

sufficiently expeditious because the Act directs the JDR court to give precedence to bypass proceedings "so that the court may reach a decision promptly and without delay in order to serve the best interests of the minor." A-61 (quoting statute). The court also relied upon the Executive Secretary's guidance stating that the decision by the JDR court "should be entered at the end of the hearing," *id.*, and seemingly construed this guidance as conveying "the unmistakable implication" that bypass requests "should be resolved within the statutory four-day period for holding hearings." *Id.* Under the opinion of the court below, a judicial bypass mechanism -- even in a parental consent statute[11] -- need contain no explicit mandatory time limit whatsoever on when the state court must decide the minor's request for a bypass.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with the decisions of this Court on three important issues of federal law. *See* Sup. Ct. R. 10(c). The decision below also conflicts with the decision of every other United States court of appeals to have addressed the important constitutional question of whether mature minors are entitled to obtain an abortion without parental notice. *See* Sup. Ct. R. 10(a).

First, the decision directly contradicts one of the central premises of Justice Powell's opinion in *Bellotti II*, 443 U.S. at 647: that mature minors have a right to obtain an abortion "without parental consultation or consent." This is a right recognized by every other court to address the issue and relied upon for nearly two decades by a generation of young women in this country. In departing from *Bellotti II*, the court below adopts and extends the opinion of Justice Kennedy in *Hodgson v. Minnesota*, 497 U.S. 417 (1990),

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[11] The portion of the opinion below addressing the Act's expeditiousness purports to apply the *Bellotti II* standards. *See* A-57. Accordingly, this portion of the opinion appears to govern both notice and consent statutes.

dissenting from this Court's invalidation of Minnesota's two-parent notice statute without judicial bypass. *See id.* at 491-97.[12]

Second, the court below concludes that requiring notice of an abortion to a non-abusive, non-absent parent cannot, *as a matter of law*, effectively delegate a veto power to the minor's parents or otherwise impose a substantial obstacle in the path of the minor's decision to end her pregnancy. Reaching this conclusion as a matter of law conflicts with this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), under which restrictions alleged to ensure that a woman's consent to an abortion is informed, but which are claimed to impose an undue burden, must be subject to particularized factual scrutiny. Thus, by reaching its holding as a matter of law, the Fourth Circuit has improperly replaced the undue burden standard of review established in *Casey* with a toothless rational basis standard that dips below the fact-based "reasonableness" test this Court employed in *Hodgson*.

Third, in addition to eviscerating the right of a mature minor to obtain an abortion independently, the decision of the court of appeals seeks to impose a new duty on every State to *ensure* the involvement of both parents into the private affairs of their mature daughters. This new duty extends beyond abortion into every "life-defining" decision, and could invalidate scores of state statutes guaranteeing minors the right to make such decisions independently of their parents. By creating enhanced parental rights, the court below effectively prohibits judges from authorizing abortions except in cases of abuse or neglect: other reasons for granting judicial bypass of notice would violate parents' rights.

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[12] While dissenting opinions by Justices may eventually become majority opinions, that transformation is a task for this Court, not for the lower federal courts.

Fourth, every other standing federal court decision conflicts with the decision below in its holding that a statute mandating parental notice of a minor's abortion decision need not contain a bypass mechanism satisfying this Court's plurality opinion in *Bellotti II*. The Fourth Circuit's decision also conflicts with the holdings of two other courts of appeals about the necessity of an explicit time frame for decision of a minor's bypass petition. *See* Sup. Ct. R. 10(a).

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S JURISPRUDENCE GOVERNING PARENTAL INVOLVEMENT STATUTES.

In *Bellotti II*, Justice Powell wrote that "a State [must] act with particular sensitivity when it legislates to foster parental involvement" in abortion because of "the unique nature of the abortion decision." 443 U.S. at 642. The Fourth Circuit's decision recklessly approves a statute that mandates parental involvement in the abortion decision of minors not only without sensitivity, but with disregard for the holdings and analysis employed by this Court.

A. The Decision Of The Court Below Is Incompatible With Justice Powell's Landmark Opinion In *Bellotti II*.

The decision of the court below is a direct attack on the holding and reasoning of this Court's "principal opinion" in *Bellotti II*, under which a minor mature enough to make the abortion decision herself has a right to obtain an abortion "without parental consultation and consent." *Id.*, 443 U.S. at 647 (plurality opinion). Only by reducing much of Justice Powell's opinion and reasoning in *Bellotti II* to *dicta*, *see* A-30 n.5, and by distorting subsequent opinions of this Court, was the court below able to reach the opposite result: that a minor mature enough to make the abortion decision on her own nevertheless may be compelled by the State to notify a

parent of her decision, regardless of the consequences to her. This conflict, reached without any evidence showing that parental notice is in any manner beneficial to the mature minor, is sufficient to justify summary reversal by this Court.

In *Bellotti II*, this Court invalidated a Massachusetts statute mandating that a minor seeking an abortion obtain the consent of her parents for the procedure. Four Justices joined the opinion of Justice Powell in that case, which holds that a statute requiring "a pregnant minor to obtain one or both parents' consent to an abortion" must also "provide an alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 643 (footnote omitted). Justice Powell's opinion set forth the features that such an alternative procedure must have in order for a parental consent statute to meet constitutional muster: it must allow a minor to show "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Id.* at 643-44 (footnote omitted). Such a procedure must also "assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.* at 644. Although Justice Powell's opinion did not constitute the opinion of the Court, his opinion has repeatedly been used by the Court as the touchstone to evaluate the adequacy of judicial bypass procedures established by states in their parental consent statutes. *See, e.g.*, *Lambert v. Wicklund*, 117 S. Ct. 1169, 1171 (1997) (adopting Justice Powell's opinion as "[t]he Court's principal opinion" in *Bellotti II*); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 440-41 (1983) ("*Akron I*") (adopting Justice Powell's plurality opinion); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 491 (1983) (same).

Although *Bellotti II* addressed the validity of a parental *consent* statute that purported to contain a judicial bypass mechanism, the statute at issue had been construed by the Massachusetts Supreme Judicial Court to require *notice* to a minor's parents of any such judicial proceeding. *Id.* at 646. Justice Powell's opinion properly recognized that such notice to parents "would impose an *undue burden* upon the exercise by minors of the right to seek an abortion." *Id.* at 647 (emphasis added). This is because "many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Id.*

Accordingly, the Massachusetts statute was defective. In a constitutional statute, the minor "must have the opportunity -- if she so desires -- to go directly to a court without first consulting or notifying her parents," *id.*, for such notice could provide a parent with the opportunity to obstruct either access to court or the abortion itself. Once she avails herself of the bypass procedure, the court "must authorize [the mature minor] to act without parental consultation *or* consent," *id.* (emphasis added), because, having reached the courthouse, a court-imposed requirement of parental consultation could create an opportunity for a parent to obstruct the abortion even if the court authorized the procedure. Even the *immature* minor "is entitled to court authorization *without any parental involvement*," *id.* at 648 (emphasis added), if the abortion is in her best interests. The state court is, however, permitted to "deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby"; *"[b]ut this is the full extent to which parental involvement may be required."* *Id.* (emphasis added).

Bellotti II balanced the state's interest in a minor receiving parental assistance with her privacy rights. *Bellotti*

II permits a state to require parental involvement in the case of an *immature, non-best interests* minor. *See H.L. v. Matheson*, 450 U.S. 398 (1981). *Bellotti II* therefore requires a screening process that burdens the rights of mature minors, but ultimately preserves their right to obtain an abortion independently of their parents. In other words, *Bellotti II* holds that the balance between the state's interest and the minor's rights must be individualized so that mature minors retain full rights even while those rights are burdened by the necessity of going through a judicial bypass.

Bellotti II thus stands for the proposition that mature minors, like minors held to be emancipated by courts, can make their abortion decision without parental involvement, a principle flouted by the court below.[13] This is especially so because the "objective, though inevitably arbitrary" use of the age of majority to confer full-fledged constitutional rights must yield to the time-sensitive, "peculiar nature of the abortion decision," which "requires the opportunity for case-by-case evaluations of the maturity of pregnant minors." *Id.* at 643 n.23. A minor mature enough to make the abortion decision independently is accordingly entitled to make that decision in sole consultation with her physician; she stands as an adult before the law. *See Planned Parenthood v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) ("By showing that they are capable of mature, informed consideration, such [mature] minors establish that the State has no legitimate interest for imposing a restriction on their liberty interests that it could not impose on adult women."), *cert. denied*, 517 U.S. 1174 (1996).[14]

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[13] Under the Fourth Circuit's holding, a mature minor, paradoxically, has greater rights under a parental *consent* statute than under a parental *notice* statute. Under the former, she has a right to obtain an abortion without any parental involvement, under the clear holding of Justice Powell's opinion in *Bellotti II*.

[14] In *Casey*, this Court approved the "reasonable assumption that minors will benefit from consultation with their parents," but cautioned that

The Fourth Circuit directly attacks this reasoning in *Bellotti II*, suggesting instead that individualized assessment of maturity is really irrelevant to the ability to make the abortion decision independently, and that any minor found to mature would still benefit from an inquiry as to whether parental involvement is in her best interest. *See* A-46-47 ("Although the age of majority might be considered arbitrary, in the most important sense it is not."). This reasoning cannot be confined to the context of parental notice; the Fourth Circuit fails to explain why maturity exempts a minor from parental involvement under a *consent* statute, but not under a notice statute. The Fourth Circuit's reasoning would thus apply equally in the parental consent context and replace the two prong bypass of *Bellotti II* with a single inquiry: is parental involvement in the minor's best interest? -- thereby rendering the maturity prong of *Bellotti II* a nullity. Thus, the "maturity" inquiry demanded under *Bellotti II*, and accepted in every subsequent decision of this Court involving parental consent statutes, would become a meaningless exercise for the minor.

The only opinion of this Court that might be read to suggest that a parental notice statute does not require a judicial bypass is *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) ("*Akron II*"). There, the Court wrote that "although our cases have required bypass

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"[w]e cannot adopt a parallel assumption about adult women." 505 U.S. at 895. Because a finding of maturity transfers the minor into the class of adult women for purposes of the abortion decision, *Casey* prohibits precisely the assumptions about mature minors made by the Fourth Circuit. *See* A-46 ("even the most mature teenager will benefit from the experienced advice of a parent, and, as a consequence of that dialogue, make a more informed, better considered, abortion choice"). Precisely these assumptions could be made about adult women at *any* age; a finding that the minor is mature enough to make the abortion decision on her own and render informed consent exempts her from such assumptions. Otherwise, a finding of "maturity" under the Act is a mere formalism, since it entitles the "mature" minor to no particular solicitude.

procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures." *Id.* at 510. The Court in *Akron II* thus left the question technically "open." *Id.* However, as the concurring opinion of Justice Stevens in *Akron II* explains, this Court has "squarely held that a requirement of preabortion parental notice in all cases involving pregnant minors is unconstitutional. Although it need not take the form of a *judicial* bypass, the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests." *Id.* at 522 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). *Akron II*, then, does not re-open the relevant question settled by *Bellotti II*: that a mature minor is entitled to obtain an abortion without parental consultation, and the State must protect this right in whatever statute it enacts. *Akron I* underscores this by rejecting a statute that required mandatory notice of a "bypass" mechanism for mature teenagers under 15 years of age. 462 U.S. at 441 n.31 ("the statute requires that the minor's parents be notified once a petition has been filed . . . , a requirement that in the case of a mature minor seeking an abortion would be unconstitutional.")

The court of appeals purports to find support for its departure from *Bellotti II* in the several opinions in *Hodgson*. But the tortured use of the opinions in *Hodgson* only confirms the conflict between this Court's jurisprudence and the decision below. *Hodgson*, properly read, contradicts the Fourth Circuit's opinion in several important respects.

First, a majority of the Court in *Hodgson*[15] described the opinion of Justice Powell in *Bellotti II* in terms that confirm the right of the mature minor to obtain an abortion without parental notice. The Court wrote that one of "the

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[15] Parts I, II, IV, and VII of the opinion of Justice Stevens in *Hodgson* are the opinion of the Court. *See* 497 U.S. at 422.

constitutional defects that Justice Powell identified in the [Massachusetts] statute" was "its failure to allow a minor who is found to be mature and fully competent to make the abortion decision *independently*." 497 U.S. at 453-54 (emphasis added). The Fourth Circuit's opinion in the instant case ignores *Hodgson's* re-affirmation of the Massachusetts statute's "constitutional defect." Thus, the Fourth Circuit opinion, which upholds a statute that fails to guarantee the ability of a mature minor to make her abortion decision "independently," is in conflict with *Hodgson*.

Second, the court below improperly construes Justice O'Connor's separate opinion in *Hodgson* to hold that a notice statute (one or two parent) is valid so long as it has an effective abuse and neglect exception and a way for minors to avoid notice to irresponsible parents. *See* A-28-29. But Justice O'Connor's opinion cannot be read to stand for this proposition.

In *Hodgson*, Minnesota argued that its statute required no "bypass" beyond that provided by its abuse and neglect exception. Justice O'Connor's opinion *rejected* this argument, finding that this exception could often result in notice to the parents. *See* 497 U.S. at 460. Justice O'Connor's opinion neither considers nor decides whether an abuse and neglect exception that did not provide notice to the minor's parents would constitute a sufficient bypass. Instead, Justice O'Connor appears to view the failure of Minnesota's abuse and neglect exception as further confirmation of the law's "unreasonableness." *See* 497 U.S. at 460. Moreover, like the Minnesota statute, the abuse and neglect exception in the Virginia law can also result in notice to the parents. The Fourth Circuit discounts this possibility by speculating that notice is far less likely to occur in Virginia than in Minnesota before the minor obtains an abortion. *See* A-51 n.8. Even if this were true, this rationale also erroneously disregards the potential for retribution after the abortion from an abusive parent. *See, e.g.*, Exhibits G &

H to Brief for Cross-Respondents, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-1125 & 88-1309) (news report and criminal information accusing Rocky Adams of murdering his daughter after she was impregnated by him and sought an abortion), *and* A-83 n.3.[16]

Third, the court below assumes, without citing any supporting evidence, as irrebuttable legislative fact that the state interests supporting parental notice of abortion are advanced rather than undermined by a statute that grants judges the discretion to compel parental notice for a mature minor. This breathtaking assumption of fact runs directly counter to the approach of the majority opinion of the Court in *Hodgson*, which scrutinized whether Minnesota's two-parent notice statute without bypass did not "reasonably further any legitimate state interest." 497 U.S. at 450 (opinion of the Court). There is *no* evidence in the record that any legitimate state interest is served by requiring a mature minor to notify a parent.[17]

Thus, the decision below conflicts directly with this Court's decisions in *Bellotti II* and *Hodgson*. Instead, it adopts the reasoning of the opinion of Justice Kennedy in *Hodgson*, which would have upheld Minnesota's two-parent notice statute without bypass.

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[16] Elsewhere in its opinion, the Fourth Circuit appears to recognize that a parent notified under the Act who does not actually speak with the minor before the abortion might later make his anti-abortion views "forcefully" known to his daughter. A-32. The potential for "forceful" retribution is certainly greater in cases where a minor has been a victim of past abuse and has unwittingly availed herself of the Act's defective abuse and neglect exception than it is in other cases.

[17] In this case, unlike *Hodgson*, there are no findings of fact by the district court, in part because the district court concluded that the Act was facially invalid under *Bellotti II*, and in part because of the preliminary stage of the proceedings in the district court.

B. The Decision Below Employs A Standard Of Review Lesser Than, And In Conflict With, That Applied By This Court.

Having embarked on a mission to undermine *Bellotti II*, and having misread *Hodgson* in its zeal to uphold the Act, the court below does not hesitate to reach its conclusions by announcing, as irrebuttable legislative facts, a range of assumptions. But this wholesale adoption of factual assumptions by the Fourth Circuit runs directly counter to this Court's recent "undue burden" jurisprudence, in which Members of the Court have repeatedly emphasized the crucial importance of careful factual analysis of restrictions claimed to enhance the quality of decisionmaking about abortion. *See generally Planned Parenthood v. Casey*, 505 U.S. 833, 888-894 (1992) (opinion of the Court) (examining factual evidence in detail to conclude that spousal notice requirement "is thus likely to prevent a significant number of women from obtaining an abortion"); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of injunction pending appeal) (stressing importance of particularized factual analysis).

As a result of its assumption of facts as a matter of law, the court below erroneously applies more deferential scrutiny to the Act than this Court applied to the Pennsylvania statute in *Casey*, and indeed applies scrutiny even more deferential than this Court applied in *Hodgson* to conclude that Minnesota's blanket two-parent notice statute "does not reasonably further any legitimate state interest." *Hodgson*, 497 U.S. at 450 (opinion of the Court). This reduction of the standard of review applicable to abortion restrictions on minors is in conflict with the decisions of this Court.

For example, the Fourth Circuit wrote, without factual support, that the imposition of parental notice "on the minor's unfettered abortion decision cannot be said to constitute a burden that is 'undue' under a Constitution that

jealously protects the sanctity of the family as the cornerstone of society." A-41-42. But determination of whether a burden is "undue" is a *factual* determination. *Casey*, 505 U.S. at 885-87 (joint opinion of O'Connor, Kennedy & Souter, JJ.) (analyzing whether factual findings by district court demonstrated undue burden from mandatory 24-hour waiting period); *id.* at 888-93 (opinion of the Court) (analyzing whether factual findings by district court demonstrated undue burden from mandatory spousal notice requirement). By proceeding to the conclusion that mandatory parental notice for mature minors is not an undue burden without factual evidence, the court below applied the incorrect standard of review.

Even assuming, *arguendo*, that a standard of review lower than the "undue burden" standard applies to restrictions on minors' access to abortion, the court below applied the wrong standard. *Hodgson* establishes that even the question of whether a parental involvement requirement furthers legitimate state interests is a fact-intensive one. *See* 497 U.S. at 450-51 (opinion of the Court) (analyzing district court factual findings to conclude that statute was not reasonably related to legitimate state interest); *see also Turner v. Safley*, 482 U.S. 78, 98-99 (1987). In contrast, the court of appeals, rather than remanding to the district court for factual findings, improperly assumed that a mature minor will benefit from parental notice. *See, e.g.*, A-46 (if a parent is notified, the mature minor "will be better able to select the physician who will perform the abortion"; "will be better situated to provide her physician with the full medical history necessary to the professional treatment she will undergo"; and "with her parents' knowing involvement, her physical and emotional post-operative recovery will be eased").[18]

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[18] Factual evidence could, of course, contradict each of these assumptions. For example, the district court would evaluate whether a mature minor, as opposed to an immature one, is likely to be missing

Thus, while paying lip service to it, the court of appeals leaves no room for fact-finding under either prong of *Casey's* undue burden test: it invents a "purpose" for the Act's constriction of the rights of mature minors, and holds that notice is *per se* not an undue burden for all but abused and neglected minors. *See* A-40. The making of these factual assumptions is in direct conflict with the standard of review employed by this Court.

C. The Fourth Circuit Erroneously Converted The State's Legitimate Interest In Encouraging Parental Involvement In Abortion Into A Duty To Facilitate Parental Involvement In Every "Life Defining" Decision By Minors.

In *Bellotti II*, Justice Powell held that parental involvement legislation "furthers a constitutionally permissible end," *id.* at 640 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring)), namely the "important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." *Id.* at 648. In *Hodgson*, the Court characterized as "legitimate" the state's interest in "support[ing] the authority of a parent who is presumed to act in the minor's best interest and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate." 497 U.S. at 450 (opinion of the Court).

The Fourth Circuit, however, raises this interest to new heights: "[A] notice statute serves the *compelling* state interest in securing inviolate the *right* of a mother and a father to rear their child as they see fit, and to participate fully in that child's life, as free from governmental

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medical history information relevant to a first-trimester abortion; or whether parents have better information about how to select an abortion provider than mature minors. The evidence could show that knowledge about one's relevant medical history and the ability to select an abortion provider are themselves benchmarks of maturity.

interference as constitutionally permissible." A-32 (emphasis added). Going yet further, the court of appeals writes that parents "are *obliged* to know, and they are *entitled* to know, the life defining decisions their children face." A-69 (emphasis in original). The court also describes as a "cardinal right" the authority of parents "to shape, as they deem appropriate, their children's lives, their beliefs, their values, their morals, their character." A-42.

The court below thus adopted the reasoning of the court of appeals in *Hodgson v. Minnesota*, 853 F.2d 1452, 1463 (8th Cir. 1988) (*en banc*). That court wrote: "[T]he district court did not consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement," a view rejected by this Court. Thus, these holdings by the court below conflict with the tempered view of this Court that renders any affirmative "right" of parents to know of their daughter's abortion decision derivative of the best interests of the minor. *See Hodgson*, 497 U.S. at 454 (opinion of the Court) (observing that the constitutional defects identified by Justice Powell in the statute at issue in *Bellotti II* "are predicated on the assumption that the justification for *any* rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child") (emphasis added).[19]

By unlinking the parental "right to know" from the minor's best interests, the Fourth Circuit's opinion invites constitutional challenges to numerous state statutes that guarantee to minors the right to make "life-defining" decisions in many arenas free of parental involvement. For example, under one Virginia statute, a minor is "deemed an adult for the purpose of consenting to": (1) diagnosis and

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[19] They also conflict with the Sixth Circuit's opinion in *Doe v. Irwin*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980), which holds that there is no affirmative parental "right to know" about a minor's decision to obtain contraception.

treatment of sexually transmitted diseases; (2) health care for birth control, pregnancy and family planning (except sterilization); (3) "outpatient care, treatment or rehabilitation for substance abuse"; and (4) "outpatient care, treatment or rehabilitation for mental illness or emotional disturbance." Va. Code Ann. § 54.1-2969(D)(1)-(4). Presumably, situations in which a minor seeks treatment for mental illness, pregnancy, or substance abuse are as much "moment[s] when . . . child is most in need of parent," A-43, as are the abortion decision, though Virginia guarantees minors the statutory right to be treated as adults in obtaining such treatment. Yet these very statutory provisions are of doubtful constitutionality under the Fourth Circuit's expansive view of parental rights.[20]

The Fourth Circuit's opinion authorizes "parental rights" challenges to every state statute, like Virginia's, that treats minors as adults for the purpose of consenting to "life-defining" treatments. This Court has never promoted parental rights as far as does the court below.[21] Accordingly,

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[20] The Fourth Circuit's creation of parental "cardinal rights" would also jeopardize the constitutionality of federal statutes designed to ensure the confidentiality of minors' access to family planning services under Title X of the Public Health Service Act, 42 U.S.C. § 300(a) *et seq.*, and under Title XIX of the Social Security Act. 42 U.S.C. § 1396d(a)(4)(C). *See, e.g., Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) ("Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics; without such assurances, one of the primary purposes of Title X -- to make family planning services readily available to teenagers -- would be severely undermined"); *T.H. v. Jones*, 425 F. Supp. 873, 878 (D. Utah 1975) (legislative history of 1972 amendments to Title XIX "bears out Congress' concern that . . . Medicaid family planning services be provided to sexually active minors who desire them on a confidential basis").

[21] Indeed, the court of appeals stops just short of suggesting parental involvement for *all* women, including adult women, based on its far-reaching view of parental rights:

> [I]t should go without saying, the parents' interest in the well-being, and continued care and support, of their minor daughter

this unprecedented elevation of parental rights merits review by this Court.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS.

A. Every Other Court Of Appeals Has Concluded That A Parental Notice Statute Must Contain A *Bellotti*-Type Bypass.

The decision of the court below is the first decision by a United States court of appeals to hold that a parental notice statute need not contain a bypass mechanism that meets the strictures set out in *Bellotti II*. To the extent that this Court views as "open" the question of whether a one-parent notice statute requires a *Bellotti*-type bypass, this conflict in the Circuits should be resolved in favor of the overwhelming majority of courts that have addressed the question.

The United States Courts of Appeals for the Sixth, Seventh, and Eighth Circuits have squarely held that parental notice statutes must include bypass mechanisms that satisfy Justice Powell's opinion in *Bellotti II*. *Miller*, 63 F.3d at 1460 ("parental-notice provisions, like parental-consent provisions, are unconstitutional without a *Bellotti*-type bypass"); *Akron Ctr. for Reproductive Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988) ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"), *rev'd on other*

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likewise does not cease upon a judicial finding that their daughter is sufficiently mature to make the abortion decision herself. *As a factual matter, of course, that interest presumptively continues for life*; but, even as a matter of law, that interest continues *at least* until the child achieves majority.

A-46 (emphasis added). Moreover, many of the facts "assumed" to be true as a matter of law by the court of appeals, *see supra* at 21-22 and 16 n.14, could also justify legislation mandating that adult women involve their parents.

grounds sub nom. Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990) (finding Ohio's bypass consistent with *Bellotti II*); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983); *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd by an equally divided Court*, 484 U.S. 171 (1987); *Women's Community Health Ctr. v. Cohen*, 477 F. Supp. 542, 547 (D. Me. 1977) (parental notice laws must have bypass).

Each of these courts has reached this result by properly recognizing that notice to a parent offers some parents the opportunity to veto the minor's abortion decision, or place a substantial obstacle in her path, as surely as if the parents were granted the power to consent *vel non*.[22] Thus, the Eighth Circuit in *Miller* wrote:

> Notifying the parent of the daughter's intentions 48 hours before the abortion can be performed gives the parent the opportunity to obstruct the daughter's choice, just as requiring consent gives parents the tool with which to do so. . . .
>
> The State can thus give parents a chance -- or even a tool -- to obstruct their immature, non-best-interests daughter's decision to have an abortion without violating the Constitution. *The State runs afoul of the Constitution, however, when it attempts to give that same*

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[22] This is why major medical organizations, including the American Academy of Pediatricians and the American College of Obstetricians & Gynecologists, while agreeing that parental consultation by the minor seeking an abortion is ideal, oppose mandatory notice as *not* in the best interest of minors. *See* Brief of the American College of Obstetricians & Gynecologists *et al.*, *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990) (Nos. 88-805 & 88-1309).

> *power to parents of mature daughters capable of making their own informed choices.*

63 F.3d at 1459-60 (emphasis added). Similarly, the *Pearson* court wrote: "Because parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion, we will apply the Supreme Court's analysis with respect to consent bypass procedures in our consideration of the constitutional sufficiency of Indiana's notification bypass procedures." 716 F.2d at 1132. *See also Slaby*, 854 F.2d at 861 ("we further conclude that [a parental notification requirement] cannot be supported in the case of a mature minor").

By contrast, the decision of the court below holds *as a matter of law* that a parental notice statute (whether it requires notice to one or both parents) "that excepts notice to the abusive, the irresponsible, the permanently absent, or the similarly disaffected parent" "vests with parents neither a veto in fact nor a veto in effect"; nor, in the view of the court below, does such a notice requirement "otherwise constitute a substantial obstacle to, or an undue burden on, the abortion decision." A-40. Not only is this holding unsupported by any evidence in the record,[23] it also defies common sense.

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[23] In *Casey*, this Court concluded, based on record evidence, that Pennsylvania's "spousal notice requirement enable[d] the husband to wield an effective veto over his wife's [abortion] decision," 505 U.S. at 897 (opinion of the Court), particularly for those women who would be reluctant to report prior abuse to the state, *id.* at 893, and those who "fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends." *Id.* Like Pennsylvania's statute, the Act contains *no* exception for minors fearful of *reporting* abuse, and its abuse exception (which may itself result in notice, *see* A-50), does not provide protection from deterrents like withdrawal of financial support or physical confinement to the home. *See* Va. Code Ann. § 63.1-248.2. Thus, the Fourth Circuit's finding that

Surely a non-abusive, responsible parent can obstruct abortion as effectively as an abusive one. The decision below thus directly conflicts holdings of these three other courts of appeals.

Moreover, the decision below holds as a matter of law that a mature minor, absent a showing of past abuse or neglect, is not entitled to a judicial bypass. A-63 ("We have concluded today that the Supreme Court would not require a parental notice provision that satisfies *Hodgson* to also provide a maturity bypass"). Indeed, the decision below relegates the mature minor to the same position as the *immature* minor: neither is entitled to avoid parental notice except upon a showing of past abuse or neglect. This holding stands in direct conflict with the holding in *Miller* that the mature minor cannot be subjected to restrictions to which adult women are immune. *See* 63 F.3d at 1460. Indeed, because there is no magic age at which individuals become mature decision-makers, the decision of the court below would justify parental notice of abortion for *all* women -- all women, no matter their chronological age, could be *assumed* to benefit from consultation with their parents. *See* n.14 *supra*.

B. The Decision Of The Court Below Is In Conflict With The Decisions Of Other Courts Construing *Bellotti II*'s Expediency Requirement.

The decision of the court below as to the expeditiousness of the Act's judicial bypass procedure also conflicts with the holdings of the courts of appeals in *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, 118 S. Ct. 357 (1997), and *Glick v. McKay*, 937 F.2d 434 (9th Cir.

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the Act does not delegate a veto power in effect not only has no factual basis, but conflicts with *Casey's* factual analysis.

1991).[24] The court below held that the Act's bypass was sufficiently expeditious to meet the requirements of *Bellotti II*, even though the Act "does not expressly specify how quickly [the minor's bypass] petition must be *decided*." A-61 (emphasis in original). In *Glick*, the court observed that the Nevada parental notice statute before it -- like the Act approved by the court below -- did "not contain any time period within which the state district court must rule upon a minor's petition . . . " 937 F.2d at 440.[25] The court accordingly held that "the Nevada statute does not constitutionally satisfy the fourth *Bellotti* criterion and therefore does not suffice for a consent statute." *Id.* at 441. In *Causeway*, the Fifth Circuit likewise invalidated a bypass procedure in a parental consent statute that failed "to provide a specific time frame for deciding the merits of a minor's application." 109 F.3d at 1110. The court held that "[s]uch an open-ended bypass procedure has never been approved." *Id.* The court reached this holding even though the judicial bypass was designated as a "summary proceeding" in which the court was to render its decision "as soon as practicable" after the hearing. *See* 109 F.3d at 1110 (quoting La. Civil Code § 2595). "As soon as practicable," the court wrote, "is insufficient under *Bellotti II*." 109 F.3d at 1111.

In direct conflict with these holdings, the court below explicitly approves such an "open-ended" bypass procedure as consistent with *Bellotti II*, basing its conclusion on the

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[24] As the Fifth Circuit noted in *Causeway*, although this Court in *Lambert* "disapproved the analysis in *Glick*, in which the Ninth Circuit held unconstitutional a bypass procedure which allowed a minor to have an abortion if parental notification, and not the abortion itself, was not in the minor's best interest . . . [n]othing in *Lambert* affects *Glick's* holding regarding *Bellotti II*'s expediency requirement." *Causeway*, 109 F.3d at 1111 n.12.

[25] The *Glick* court concluded that a judicial bypass procedure in a parental notice statute must meet *Bellotti II*'s expediency requirement. 937 F.2d at 441-42.

"unmistakable implication" it drew from "guidance" issued by the Executive Secretary. *See* A-61. But "unmistakable implications" do not satisfy *Bellotti II*'s expediency requirement. *See Causeway*, 109 F.3d at 1111. This conflict about the meaning of *Bellotti II*'s expediency requirement subjects minors to the possibility of "open-ended" judicial bypass proceedings reigned in only by "unmistakable implications," and provides an additional basis for this court to grant review in this case.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted, and the decision below summarily reversed.

Respectfully submitted,

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